INDEX

	Page
Conclusion	10
Appendix	11

CITATIONS

Cases:

Barnhill v. *Commissioner*, 148 F. 2d 913	6
Commissioner v. *Bagley*, 374 F. 2d 204	3
Commissioner v. *Flowers*, 326 U.S. 465	2, 7
Commissioner v. *Stidger*, 386 U.S. 287	2
Corn Products Co. v. *Commissioner*, 350 U.S. 46	9
Fribourg Nav. Co. v. *Commissioner*, 383 U.S. 272	9
Hanson v. *Commissioner*, 298 F. 2d 391	9
Helvering v. *Winmill*, 305 U.S. 79	9
James v. *United States*, 308 F. 2d 204	6
Jones v. *Liberty Glass Co.*, 332 U.S. 524	9
Peurifoy v. *Commissioner*, 358 U.S. 59	2
United States v. *Leslie Salt Co.*, 350 U.S. 383	9
United States v. *Stowe-Woodward, Inc.*, 306 F. 2d 678, certiorari denied, 371 U.S. 949	9
Verner v. *Commissioner*, 39 T.C. 749	7
White v. *Winchester Club*, 315 U.S. 32	9
Williams v. *Patterson*, 286 F. 2d 333	7

Statutes:

Internal Revenue Code of 1954:	
Sec. 162 (26 U.S.C. 162)	1, 4, 5, 9
Sec. 262 (26 U.S.C. 262)	1, 4
Sec. 7805 (26 U.S.C. 7805)	1, 9

281-403—67——1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 113

UNITED STATES OF AMERICA, PETITIONER

v.

HOMER O. CORRELL AND DOROTHY CORRELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

This case presents essentially a question of sound tax administration.

Congress has expressly given to the Secretary or his delegate the power to "prescribe all needful rules and regulations for the enforcement" of the Internal Revenue Code. 26 U.S.C. 7805(a). The practical, narrow issue here is whether the Commissioner of Internal Revenue may use this statutory authority to interpret the phrase "away from home" in this situation. The Commissioner's problem is to implement the interacting congressional policies that allow deductions for business travel expenses, 26 U.S.C. 162(a)(2), while denying deductions for "personal, living, or family"

expenses, 26 U.S.C. 262, and to do it in a way that is clear and capable of efficient administration. It is not material that the courts might have chosen a different rule than the Commissioner has, were the question one of first impression. Unless it is shown to be unreasonable and arbitrary, the Commissioner's long-continued interpretation should be upheld.

I.

The deduction respondent has claimed is, in the statutory language, for "traveling expenses (including amounts expended for meals and lodging * * *) while away from home"; his conclusion (Br. 10–11)[1] that the Commissioner has no authority to interpret these words turns on his claim that the last three words—"away from home"—are so plain and unambiguous as to be obvious in their meaning (Br. 3–5).

Clearly though, there is an inescapable question of construction. It has, for example, long been established that a commuter is not "away from home" when he leaves his residence and travels to his office. See *Commissioner* v. *Flowers,* 326 U.S. 465, 473. Indeed, in *Flowers* and in two other cases this Court has had occasion to construe this supposedly "clear" statute. *Peurifoy* v. *Commissioner,* 358 U.S. 59, and *Commissioner* v. *Stidger,* 386 U.S. 287.

---

[1] "Br." refers to respondent's brief. "Ch. Br." refers to the *amicus* brief of the Manufacturing Chemists Association. "Sm. Br." refers to the *amicus* brief of the Bureau of Salesman's National Association.

The difficulties are further apparent when respondent's arguments are examined in detail. Though respondent urges the "plain" meaning of this statute, he never says what this is except to say that the Court should look to the "plain, ordinary and popular" meaning of the statutory words (Br. 5). The very concept of "traveling," though, requires a physical separation from home; anyone who is "traveling" is thus by definition away from his home. Respondent himself seems to perceive that such an approach would make the phrase "away from home" redundant and add nothing to the statutory word "traveling". See *Commissioner* v. *Bagley,* 374 F. 2d 204, 207 (C.A. 1). Thus, he variously suggests that the language encompasses only those who travel beyond their "own home town" (Br. 7), or outside "the greater * * * metropolitan area" where they reside (Br. 8).

Nor are these the only possible interpretations of the statutory language. Thus, each *amicus* suggests that a traveler is "away from home" when he has traveled "a substantial distance" (Ch. Br. 6; Sm. Br. 7–8). One of them would apparently accept as a reasonable alternative the Commissioner's "sleep-or-rest" rule (Sm. Br. 6–7), and add that a traveler is also "away from home" if he "spends a substantial time away from his principal post of duty" (Sm. Br. 11)—making the test of substantiality whether the traveler eats "more than one meal outside the general area of his home" (Sm. Br. 8).

In none of the briefs opposing the Commissioner's position are we told why the Commissioner is not free to make a reasonable choice among the varied sug-

gested readings of the statute. Nor are we told in any way whether or how any of these alternative interpretations properly reflects the fact that Congress has also provided in Section 262 that "no deduction shall be allowed for personal, living or family expenses." The principal effect of these conflicting suggestions and explanations is to illustrate the need for the Commissioner to articulate an administrable interpretation that adequately fulfills the several Congressional objectives.

II.

The remaining question is whether the Commissioner's "sleep-or-rest" rule is a reasonable implementation of the congressional purposes. One *amicus* apparently concedes that, at least for some purposes, it is (Sm. Br. 6–7). Respondent and the other *amicus* charge, however, that the test is unreasonable—each doing so on a ground that contradicts the other's analysis.

The Commissioner's rule is based on two premises: (1) Section 162(a)(2) should be construed to allow deductions in those circumstances where business travel will, in the general case, be expected to result in expenses significantly larger than the usual "personal, living, or family" costs that Section 262 makes nondeductible; while at the same time (2) providing equal treatment of those who are in economic positions similar to the commuter or local traveler, whose expenses all agree are not deductible because of the specific prohibition of Section 262.

Respondent apparently would concede (see Br. 6)

that allowing him a deduction would favor him over commuters and intra-city travelers. But he asserts that in Section 162(a)(2) Congress may have intentionally granted a tax "windfall" to those who, like most taxpayers, leave their residences in the morning and return there at night, but, who, unlike most, happen to cross the boundaries of their home towns or their metropolitan areas during the work day (Br. 6). No explanation is given for this reading of the legislative purpose; nor is recognition given to the contrary legislative history.[2] In result, respondent would have the deduction, while his fellow salesmen whose routes were within their home towns are denied tax relief, even though their work schedules and economic situation are no different than his.

The *amicus* Manufacturing Chemists Association, on the other hand, has "no doubt that equality of treatment is a fundamental goal of our system of taxation * * *" (Ch. Br. 6). This *amicus* bases its disagreement with the Commissioner on the unsubstantiated assertion that "Experience by those who travel considerable distances such as a one-day jet trip between New York and Chicago indicates that the expenses for meals significantly exceed the costs of comparable meals by those who remain at their home base." (Ch. Br. 7.)[3]

---

[2] The legislative history discussed in our opening brief, at pp. 11–12, shows that enactment of the first predecessor of Section 162(a)(2) resulted from the Commissioner's concern with the need to grant deductions for meal and lodging expenses that exceed those ordinarily incurred when not traveling.

[3] In contrast, the other *amicus* asserts (Sm. Br. 7 n. 10) that the Commissioner's rule is unreasonable because those who re-

As this illustration and the variety of rules that are said to be superior to the Commissioner's indicate, the possible variations are legion—distance traveled, time away, method of transportation, number of meals, home arrangements that do or do not involve duplication of costs, and so on. Somehow the line must be drawn, in a practical and workable way, between deductible travel expenses and nondeductible "personal, living, or family expenses". This is precisely the sort of determination that Congress intended to be made by the Commissioner on the basis of his experience and expertise.

The courts have repeatedly recognized the validity of the premises from which the sleep-or-rest rule has been derived. As the Fourth Circuit has said, the traveling expense statute was enacted because Congress "recognized that the taxpayer must maintain a home for his family at his own expense even when he is absent on business". *Barnhill* v. *Commissioner,* 148 F. 2d 913, 917. Expenses of daily life do not increase significantly because a taxpayer eats one or two meals away from his residence, for comparable restaurant expenses are incurred by many—if not most—commuters, intra-city travelers and others not entitled to the deduction. It is when a taxpayer's travel requires a stop for sleep or rest that "continuing costs incurred at a permanent place of abode are duplicated". *James* v. *United States,* 308 F. 2d 204, 206 (C.A. 9);

---

ceive free meals on airplanes—*i.e.*, those whose living expenses are reduced by jet travel—are allowed to deduct the entire air fare without eliminating the value of the meals.

see also *Verner* v. *Commissioner*, 39 T.C. 749, 754. It is only at this point that there are, generally speaking, the appreciable expenses above the usual "personal, living, or family expenses" that caused Congress to allow a deduction for meals and lodging while "traveling * * * away from home." See note 2, *supra*.

Consequently, by basing his rule on the need for sleep or rest, the Commissioner has implemented the congressional purpose of allowing deductions "only when * * * business forced the taxpayer to travel *and to live* temporarily at some place other than" his business headquarters. *Commissioner* v. *Flowers*, *supra*, at p. 474. [Emphasis supplied.] At the same time the Commissioner has properly avoided discrimination against those who "do not work in a mobile office." *Williams* v. *Patterson*, 286 F. 2d 333, 337, n. 10 (C.A. 5).

Otherwise, the line would be drawn against the one- or two-meal commuter or the intra-city traveler, but in favor of persons who travel across a municipal or metropolitan boundary in the same business day who would be allowed deductions for all work day meal costs. Though there may be differences, they are slight, and they are more than overcome by the desirability of equal treatment among similarly-situated taxpayers. The problem is where to draw the line. The Commissioner, in his "sleep-or-rest" rule, has drawn the line at a point where a real difference does appear, with a consequent maximizing of equality of treatment among taxpayers.

Moreover, the Commissioner's rule is clear and

readily capable of administration. Whatever the rule, there will be some cases that some court would have preferred to resolve in a different way. But this is the sort of matter on which there should be a rule that is capable of being administered by revenue agents and applied as a matter of course by taxpayers.[4] To say, as one *amicus* does (Sm. Br. 7), that "each case must be decided on its own facts and circumstances" is the antithesis of a sound and workable method of administering a deduction provision that affects, often in a small way, the tax liabilities of a multitude of people in widely varying situations.

For from undermining the government's position, the briefs of respondent and *amici curiae*—with their conflicting suggestions for new substitute rules—illustrate the desirability of upholding the Commissioner's long-standing interpretation. All of the suggested new rules would give rise to administrative difficulties or inequity; none of them would distinguish between travelers whose daily living expenses are substantially increased by business travel, on the one hand, and travelers who incur expenses not substantially greater than those incurred by commuters, intra-city travelers and itinerants (who are clearly not entitled to the deduction), on the other.

---

[4] Thus, the "sleep-or-rest" rule has enabled the Commissioner to provide an easily applied guide for taxpayers. Instructions based on the rule have been in the annual publication, *Your Federal Income Tax* ever since 1946, and in the instruction pamphlet for Form 1040 since 1948. See our opening brief at pp. 16–17, n. 14–15. Examples of these instructions are set forth in the Appendix to this reply brief.

Congress has entrusted the practical problems of administration of the tax laws to the Commissioner. We suggest that the appropriate judicial function in cases such as this is to determine whether the Commissioner's rule is a reasonable way to construe and administer the statute. The sleep-or-rest rule has been consistently applied to meal expenses for more than a quarter century. It bears on a subject where there is a particular need for an administratively practical solution. Congress was well aware of the rule when it reenacted Section 162(a)(2) in 1954—at a time when the courts had without exception approved the rule in cases such as this one [5]—and thus must be taken to have approved the administrative practice. *Fribourg Nav. Co.* v. *Commissioner*, 383 U.S. 272, 279–280, 283; *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 53; *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 397; *Helvering* v. *Winmill*, 305 U.S. 79, 83; *United States* v. *Stowe-Woodward, Inc.*, 306 F. 2d 678, 680 (C.A. 1), certiorari denied, 371 U.S. 949; see also *White* v. *Winchester Club*, 315 U.S. 32, 41.[6] This, in brief, is precisely the sort of fair and workable rule that Congress, in enacting 26 U.S.C. 7805(a), expected the Commissioner to

---

[5] See our opening brief at p. 16, n. 12. See also that brief at p. 19, n. 16 for a discussion of the differing judicial treatment of transportation expenses.

[6] In light of the Commissioner's consistent position, which the courts accepted, there is no merit to respondent's inference (Br. 14) of congressional acquiescence in the Eighth Circuit's 1962 decision in *Hanson* v. *Commissioner*, 298 F. 2d 391. *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 533–534; *White* v. *Winchester Club*, 315 U.S. at 40.

adopt. Since it is a reasonable interpretation of the statutory scheme, it should be upheld by the courts.[7]

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded to the district court with directions to dismiss the complaint.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
HARRIS WEINSTEIN,
Assistant to the Solicitor General.
GILBERT E. ANDREWS,
EDWARD LEE ROGERS,
Attorneys.

NOVEMBER 1967.

---

[7] As one *amicus* suggests (Ch. Br. 5–6), our opening brief inadvertently cites (p. 20) three cases as authority for the statement that reenactment of the statute was "persuasive evidence of tacit Congressional approval" of the Commissioner's position, when the cases should have been cited in support of the contention that legislative history is relevant in construing a statute.

APPENDIX

The instruction pamphlets for Income Tax Return Form 1040 for the years 1948 through 1950 (p. 6), 1951 (p. 5), 1952 (pp. 5–6), 1953 (pp. 5–6), and 1954 through 1957 (p. 6), stated substantially as follows:

> The law provides special deductions for the expenses of travel, meals, and lodging while away from home in connection with your employer's business. Traveling "away from home" means going away from the city or town where you normally work and remaining away at least overnight.

The instruction pamphlets for the years 1958 through 1960 (p. 6) stated:

> The law requires that certain employee business expenses be handled differently from other expenses. The rules are as follows:
>
> A. Travel * * * expenses:
>
> * * * * *
>
> (1) Expenses for travel, including the cost of meals and lodging while temporarily away at least overnight* from the city, town or other general area which constitutes your principal or regular business location are deductible as expenses for travel while "away from home."
>
> * * * * *

The instruction pamphlets for the years 1961 and 1962 (p. 4) stated:

> If you are temporarily away on business, at least overnight from the city, town, or other

*In the pamphlet for the year 1958, "overnight" was followed by "but ordinarily for less than a year."

general area which constitutes your principal or regular business location, you can deduct meals and lodging in addition to the travel costs.

The same instruction pamphlets for the years 1963 (p. 4) and 1964 through 1966 (p, 7) stated:

> You may deduct the expenses shown below * * *
>
> * * * * *
>
> (2) *Meals and lodging.*—If you are temporarily away on business, at least overnight from the city, town, or other general area which constitutes your principal or regular business location.

The annually issued booklet entitled "Your Federal Income Tax" has since 1946 referred to the overnight or sleep-or-rest rule. Typical examples are as follows:

(1) The 1946 edition, pp. 89–90:

> Your Federal Income Tax
>
> No. 35
>
> TRAVELING EXPENSE DEDUCTIONS
>
> * * * * *
>
> If a person conducts a regular trade or business in the city in which his permanent home is located but makes occasional business trips to different localities which require his absence overnight, he is considered to be traveling away from home and the full amount of traveling expenses incurred on such trips, including the cost of meals and lodging, is deductible in computing his adjusted gross income. To illustrate, a person who runs a regular business in his home town is called upon to make occasional

trips to Washington, D.C. (from which he does not return the same day), to consult with, give advice, and render other intermittent services to the Federal Government. He may deduct the full amount of his traveling expenses for such trips, even though his stays in Washington, D.C., may be of extended duration. If, however, he makes trips from which he returns to his home by the end of the same day, he is not considered as traveling away from home, regardless of the distance traveled, and while the cost of transportation may be deducted as an ordinary expense of business, the costs of meals and lodging incurred are regarded as in the nature of personal living expenses and therefore are not deductible in computing his adjusted gross income.

* * * * *

(2) The 1955 edition, p. 16:

CHAPTER 9. EXPENSES OF EMPLOYEES

Certain expenses incurred by employees in connection with their work are deductible on their income tax returns.

* * * * *

TRAVEL AND TRANSPORTATION

Expenses of travel, meals and lodging while "away from home" in connection with your duties are deductible in arriving at adjusted gross income and should be deducted from your compensation when that amount is entered on page 1 of Form 1040. "Away from home" means going away from the city or town where you normally work and remaining away at least overnight.

* * * * *

(3) The 1959 edition, pp. 42, 43:

15. TRAVELING AND TRANSPORTATION

Traveling and transportation expenses are deductible if they are ordinary and necessary to your business or job

You may deduct your traveling and transportation expenses (defined later) which are ordinary and necessary to your business or employment.

* * * * *

TRAVELING EXPENSES

To the average person traveling expenses include almost any expense involved in the movement of a person from one place to another. However, for tax purposes traveling expenses has a more restrictive meaning.

Traveling expenses are the reasonable and necessary expenses of traveling away *from* home overnight in pursuit of your business or employment and include the cost of meals and lodging.

* * * * *

You are away from home overnight if your duties require you to be away from the general area of your tax home for a period which is substantially longer than an ordinary day's work and of sufficient length to necessitate relief from duty to obtain sleep. You need not be away from your tax home for an entire 24-hour day or throughout the hours from dusk to dawn so long as your relief from duty during your absence is to obtain necessary sleep, and not merely to relax or eat.

Example 1.—You work for a trucking company. You leave your terminal station at 6 p.m. and return there 15 hours later. You are released at your turn-around point for 2 hours in

order that you may eat. Since you are not released from duty at your turn-around point to obtain necessary sleep, you are not away from home overnight.

Example 2.—You work for a bus line. You leave your terminal station at 8 a.m. and return about 16 hours later. At your turn-around point you are released for 4 hours for necessary sleep. Since you are released for necessary sleep before returning to your home terminal, you are away from home overnight.

* * * * *

(4) The 1963 edition, pp. 48, 49:

TRAVELING EXPENSES

* * * * *

Traveling expenses and transportation expenses are very similar. Both include the fares charged for travel by air, rail, bus, taxi, etc., and the cost of operating and maintaining your automobile. For tax purposes they are distinguished in that traveling expenses are the reasonable and necessary expenses of traveling away from home overnight in pursuit of your business or employment and include the cost of meals and lodging. Transportation expenses do not include the cost of meals and lodging but transportation expenses are deductible to the extent they are directly attributable to the actual conduct of your business or employment. The important thing is to determine the location of your tax home, and whether you are traveling away from that home overnight, to distinguish between traveling and transportation. Transportation expenses are discussed in more detail later in this chapter.

* * * * *

You are away from home overnight if your duties require you to be away from the general area of your tax home for a period which is substantially longer than an ordinary day's work

and that when away, during released time, it is reasonable for you to need and to obtain sleep or rest in order to meet the requirements of your employment or business or demands of your employment. You need not be away from your tax home for an entire 24-hour day or throughout the hours from dusk to dawn so long as your relief from duty during your absence is to obtain necessary sleep, and not merely to relax or eat.

Example 1.—A railroad conductor leaves his home terminal on a regularly scheduled round-trip run between two cities and returns home 16 hours later. During the run, he is released for 6 hours at his turn-around point where he eats two meals and rents a hotel room to obtain necessary sleep before starting the return trip. He is considered to be away from home overnight.

Example 2.—A truckdriver leaves his terminal and returns 12 hours later. He is released at his turn-around point for 2 hours in order to eat. Since he is not released to obtain necessary sleep, he is not away from home overnight.

U.S. GOVERNMENT PRINTING OFFICE: 1967